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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1940

No. 198

ROBERT R. COX,

*Petitioner,**vs.*

COMMISSIONER OF INTERNAL REVENUE.

No. 199

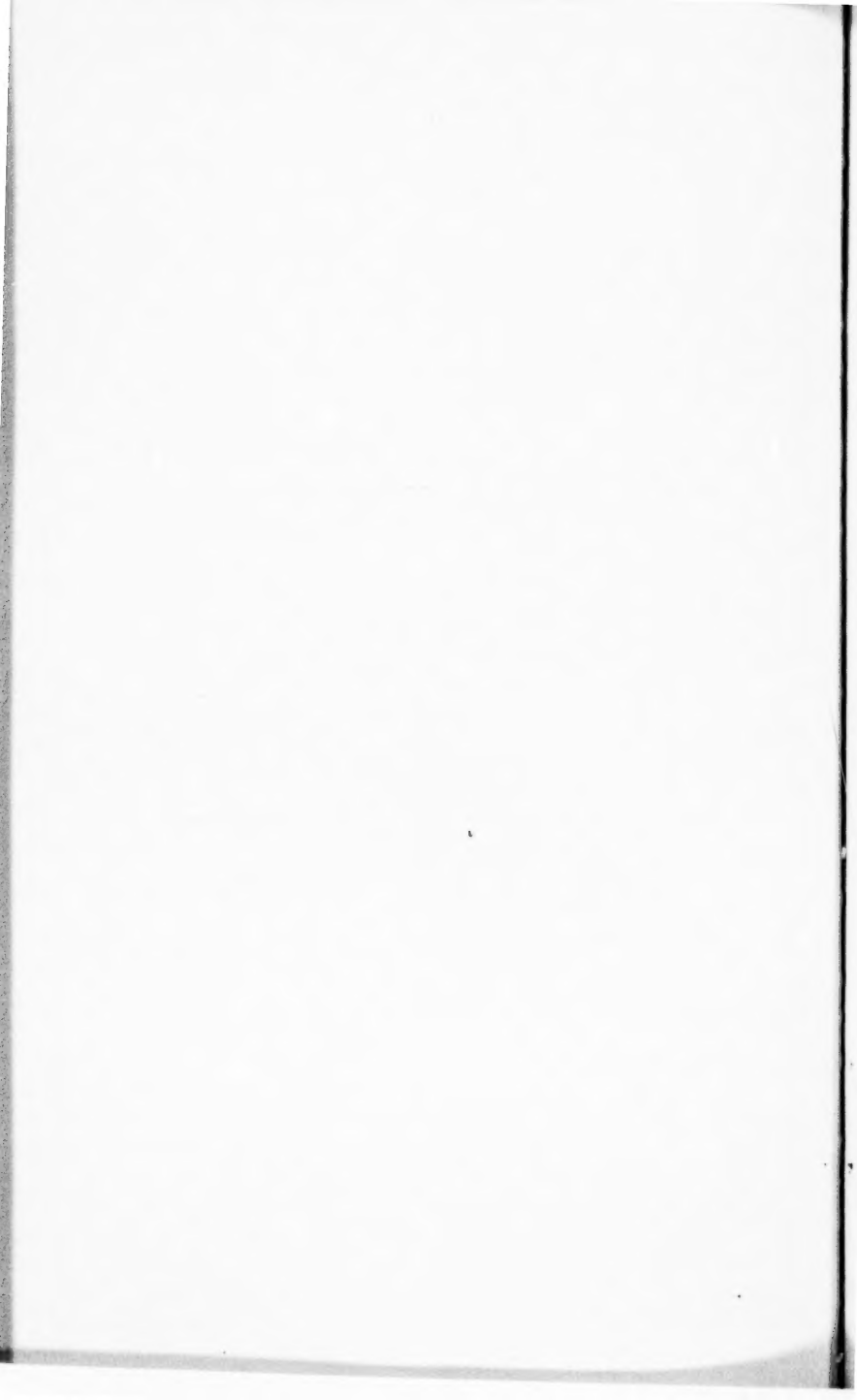
ETHEL K. CHILDERS,

*Petitioner,**vs.*

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

ROBERT R. STONE,
ELLIS D. BEVER,
Counsel for Petitioners.



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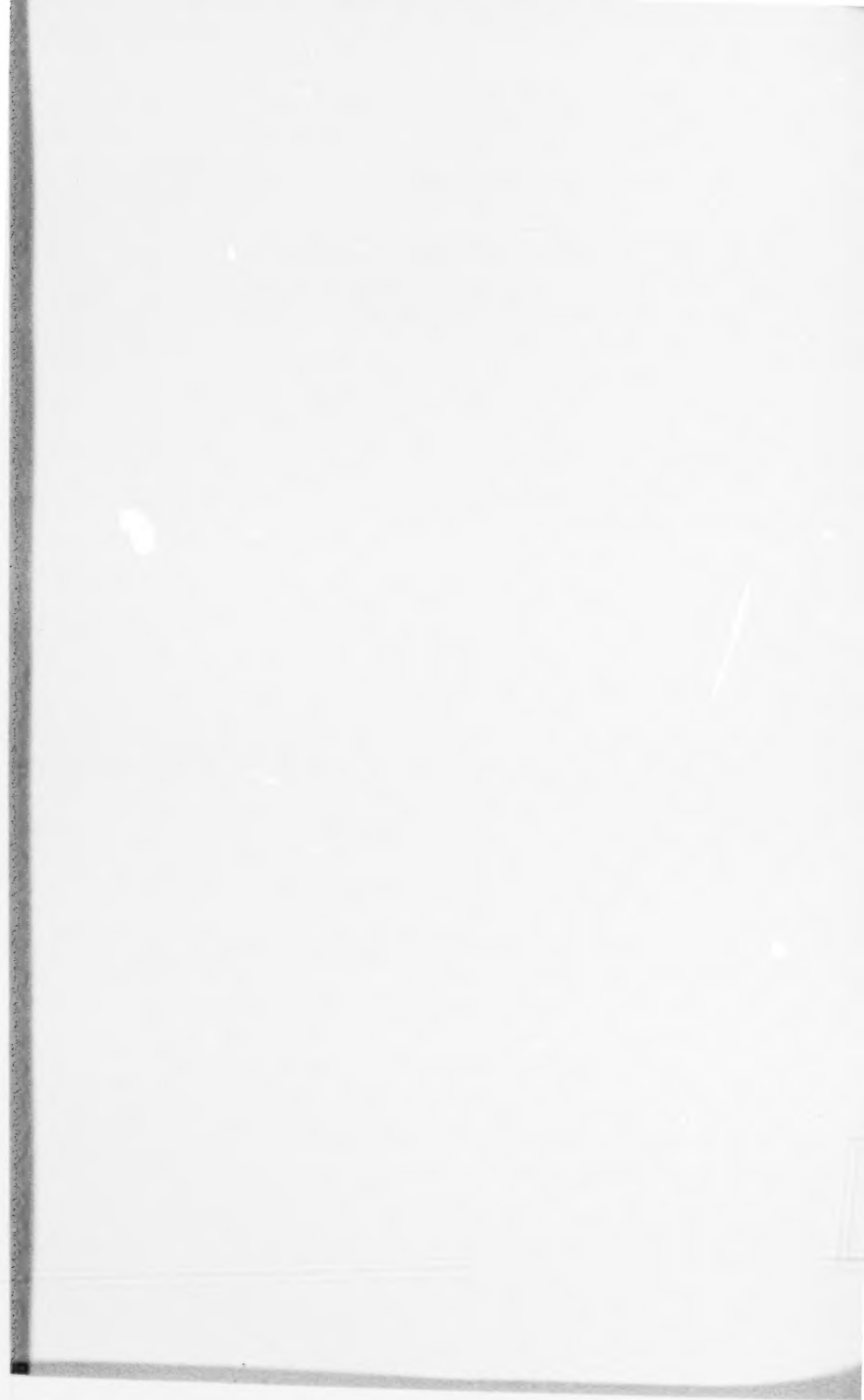
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**PETITION OF ROBERT R. COX AND ETHEL K.
CHILDERS FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioners, Robert R. Cox and Ethel K. Childers submit this petition for Writs of Certiorari, to review the decision and judgments of the United States Circuit Court of Ap-

peals for the Tenth Circuit, in the above entitled causes, and file herewith a certified copy of the transcript of the record in said causes and petitioners' brief in support of this petition.

The decision and judgments of the United States Circuit Court of Appeals for the Tenth Circuit (R. 66 and R. 67), reported at 110 F. (2d) 934 (April 4, 1940), affirmed decisions of the United States Board of Tax Appeals (R. 22 and R. 53), reported at 39 B. T. A. 904 (R. 46), and determined that the entire income of a trust created by each of the petitioners was taxable to each of them as grantor under sections 22 (a) (48 Stat. 680, 686) and 166 of the Revenue Act of 1934 (48 Stat. 680, 729). The same question is involved in both cases because the essential features of the trust agreements are identical.

The two cases were consolidated for argument and decision in the court below, although separate judgments were entered. The Board of Tax Appeals filed its findings of fact and opinion in the *Childers* case (R. 46). Only a memorandum opinion was filed in the *Cox* case (R. 22), which was decided upon the authority of the *Childers* decision. In this petition and brief we shall discuss both cases with reference to the facts of the *Childers* case, since the essential features of the two trust instruments are identical.

Summary Statement of the Matter Involved.

Each of the petitioners transferred property in trust by agreement dated May 16, 1932 (R. 13 and R. 36). Each trust instrument was subsequently amended on June 11, 1932 (R. 21 and R. 46). The *Childers* trust was amended again on January 8, 1933 (R. 44).

The respondent, in paragraph five, of his answer (R. 33), filed with the Board of Tax Appeals, admits the facts alleged, in paragraphs 5 (a) (R. 31) and in the fifth un-

lettered subparagraph following paragraph 5 (a), of the petition (R. 32), that the title to the securities constituting the corpus of the trust was transferred by the petitioner to the trustees and that, "The petitioner, by virtue of the trust agreement, permanently and definitely divested herself of all title and interest in and to the corpus and to nine-tenths of the income of the trust," subject only to the power of revocation in paragraph Sixth of the trust instrument as amended (R. 46).

The Childers trust agreement names E. K. Childers and Robert R. Cox as trustees and, as amended, provides:

In paragraph Second (b) that one-tenth of all net income should be paid to the donor, E. K. Childers, for and during her life time, and that the remainder of the net income not paid to E. K. Childers should be paid one-fifth each to a son, a daughter, a sister-in-law, and two sisters (R. 38 and R. 45). The son and daughter are minors (R. 35).

In paragraph Second (c) that the income of any beneficiary might be accumulated "for future distribution to such beneficiary" and that each income fund shall be kept separately in the accounts of the trustee as though each income fund constituted a separate trust (R. 39).

In paragraph Second (d) that in case the net income allotted for the benefit of any beneficiary is at any time insufficient, in the opinion of the trustees, for the comfort, maintenance and/or education of such beneficiary, the trustees may pay out such sums from the principal as in their sole discretion may be necessary for such purpose or purposes (R. 39).

In paragraph Third that the trust shall terminate upon the death of the donor, and that the entire corpus and accumulated income shall be distributed to the beneficiaries

other than the donor, except that the trust should continue as to distributive shares of minors until they reach the age of 25 years. Upon termination of the trust, a complete disposition of all trust property is made and no part of such property could ever revert to the estate of the donor (R. 40).

In paragraph Fourth (c) the trustees are given the usual trust powers of investment including the power to invest in the unsecured notes or bonds of any corporation, firm or syndicate in which the "Trustee E. K. Childers" is at the time a stockholder, partner, or member, if approved by the Donor, and the Trustees shall not be liable for any loss so resulting from any investment so made (R. 42).

In paragraph Fourth (e) the trustees are given the customary power to determine the mode in which expenses are to be borne as between capital and income and to determine the proper division of receipts between capital and income (R. 42).

In paragraph Fifth that in all matters wherein discretion is granted to the trustees, the decision of the "Trustee E. K. Childers" shall be binding (R. 43).

In paragraph Sixth, the Donor reserved the power to alter, amend, or revoke the trust in conjunction with any other beneficiary then *sui juris* and having a substantial adverse interest in the disposition of the corpus of the trust, or the income therefrom (R. 46).

The stipulation of facts (R. 34) was adopted by the Board of Tax Appeals as its findings of fact.

The Commissioner of Internal Revenue determined that the whole income of each of the trusts for the year 1934 was taxable under section 166 of the Revenue Act of 1934, to the respective grantors, petitioners herein, and issued deficiency notices against each of the petitioners (R. 6). Within the time prescribed by law, petitions were filed

with the Board of Tax Appeals and the proceedings were submitted to the Board on stipulations of facts (R. 11 and R. 34). When such stipulations were entered into, counsel for the Commissioner stated that the respondent relied exclusively on section 166 of the Revenue Act of 1934. For that reason any evidence which might be necessary under any other sections was omitted from the stipulation. After the cases were submitted to the Board of Tax Appeals and the petitioners had filed their briefs, the respondent in his brief stated: "The action of the Commissioner was predicated on the application of section 166 of the Revenue Act of 1934. The respondent now also invokes sections 167 and 22 (a) of the Revenue Act of 1934." The Board in its opinion bases its decision upon section 167, declining to decide whether the case came under the provisions of sections 166 or 22 (a) (R. 50). In its opinion in the *Childers* case (R. 46), promulgated on May 18, 1939, the Board held that the petitioner was taxable on the entire income of the trust for the year 1934, stating in its opinion as follows (R. 51):

"* * * The present case, in our opinion, is clearly within Section 167.

"* * * whether all or any part of the income should be accumulated, whether it was to be treated as corpus, whether the corpus should be invaded and, if so, to what extent, and whether such accumulation or invasion should be for her benefit rested entirely within her discretion. * * *"

A similar conclusion was reached by the Board in the *Cox* case in memorandum opinion entered May 19, 1939 (R. 22).

Each of the petitioners then filed a petition in the Circuit Court of Appeals for the Tenth Circuit, under Section 1141 of the Internal Revenue Code (53 Stat. 164), seeking

a review and reversal of the decisions of the Board. In his brief before the Circuit Court of Appeals the respondent did not contend that the income of the trusts was taxable to the grantor under sections 167 or 22 (a) of the Revenue Act of 1934, but contended that the income was taxable to the grantor under section 166 of the Revenue Act of 1934. The Circuit Court of Appeals for the Tenth Circuit held, in its decision rendered on April 4, 1940, that the income of each of the trusts was taxable to the grantor under sections 166 and 22 (a) of the Revenue Act of 1934.

Statement of the Basis of Jurisdiction of This Court, to Review the Judgment of the Circuit Court of Appeals.

A. This Court has jurisdiction to review the decisions of the Circuit Court of Appeals by virtue of Section 1141 I. R. C., 53 Stat. 164; and 28 U. S. C. 347, 43 Stat. 938.

B. The judgments of the Circuit Court of Appeals sought to be reviewed were entered on April 4, 1940, and the date of filing this petition for Writs of Certiorari with the Clerk of this Court is within three months from the said April 4, 1940.

Questions Presented.

(A) Where the grantor of a trust is one of the trustees and also one of the beneficiaries, does a provision in the trust instrument permitting the trustees, in case the net income allotted for the benefit of any beneficiary is insufficient in the opinion of the trustees for his comfort, maintenance and/or education, to pay to such beneficiary such sums from the principal of the trust as may be necessary for such purposes, constitute a power to revest in the grantor title to the corpus of the trust, within the meaning of Section 166 of the Revenue Act of 1934?

(B) Where property is transferred by an individual to himself and another as trustees, do the powers granted the trustees to withhold and accumulate the income for future distribution to the beneficiaries; to determine the mode in which expenses are to be borne as between capital and income and to determine the proper division of receipts between capital and income; to freely invest the corpus and accumulated income; and to pay to the beneficiaries such sums from the principal of the trust as may be necessary for the comfort, maintenance and education of any beneficiary in the event the income allotted for the benefit of such beneficiary is insufficient therefor in the opinion of the trustees, constitute a power to revest in the grantor title to the entire corpus under section 166 of the Revenue Act of 1934, when the only power reserved in the trust instrument to alter, amend or revoke the trust must be exercised with the consent of a beneficiary then *sui juris* and having a substantial adverse interest to the grantor?

(C) Do the powers granted to E. K. Childers as one of the trustees, together with her relationship to the beneficiaries, make the trust a mere "sham" so that it should be disregarded for income tax purposes as lacking substance and the income taxed to the grantor under the provisions of Section 22 (a) of the Revenue Act of 1934?

(D) Could the court below properly consider Section 22 (a) when that section was not raised before the court?

(E) Could the court below add to the findings of fact of the Board of Tax Appeals by assuming that because of the relationship existing between the donor and the beneficiaries, it is wholly improbable that a beneficiary would resort to a Court of Equity to restrain an abuse of discretion by the trustee, (R. 65) or that in view of the family relation a consent to termination of the trust would be freely given?

Reasons Relied Upon for Allowance of the Writs.

1. The decisions of the court below holding that "the power to revest in the grantor title to the whole of the corpus was vested in the donor under each trust instrument, and that the whole of the income is taxable to the donor" under section 166 of the Revenue Act of 1934, because of the provision in each trust that the trustees may pay out such sums from the principal as in their opinion is necessary for the comfort, maintenance or education of any beneficiary, is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Higgins v. White*, 93 F. (2d) 357.

2. The decision of the court below that the powers granted to the trustees were in substance powers reserved by the donor and that such powers were equivalent to ownership of the corpus, disregards the separate entity of the trustee, and is in conflict with the decision of this Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339; *Higgins v. White*, 93 F. (2d) 357, 358.

3. The decision of the court below that, considering the various powers given to the trustees and the relationship of the grantor and the beneficiaries, the trust accomplished nothing more than an arrangement for distribution of income to a family group at the will of the grantor and that consequently the income was taxable to the donor under the rule of *Helvering v. Clifford, Jr.*, 60 S. Ct. 554, 308 U. S. —, is not in accordance with the doctrine enunciated in the *Clifford* case and fails to note the essential distinguishing features between the instant cases and the *Clifford* case. The beneficiaries and grantor in the instant cases cannot be considered a "family group." The trusts in these cases are not short term trusts, but provide for permanent dispositions of both income and corpus to beneficiaries other than the donor.

The court below failed to note that in reality no power of the trustees could be abused for the benefit of the grantor.

4. Writs of Certiorari should be granted in these cases, which involve trusts in usual and ordinary form, and the court should consider and direct the application of its decision in *Helvering v. Clifford, Jr.*, 60 S. Ct. 554, 308 U. S. —, to these trusts and to similar trusts in cases now pending in other Circuit Courts of Appeal. The decisions of the Board of Tax Appeals in recent months are inconsistent in the application of this Court's decision in the *Clifford* case and the application of sections 22 (a) and 166 of the applicable revenue acts to trusts similar to those herein involved. Considerable confusion exists with reference to the taxation of the income from trust estates and this court should further clarify the law with reference to this important question.

We are advised that there are several thousand controversies, involving the question whether trust income is taxable to the grantor, now pending in the Bureau of Internal Revenue, before the Board of Tax Appeals or in the Federal Courts, a great many of which involve substantially the questions raised herein.

Conclusion.

WHEREFORE, it is respectfully submitted that this Petition for Certiorari should be granted.

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